JAN 21 2003

No. 02-954

IN THE SUPREME COURT OF THE UNITED STATES

OFFICE OF INDEPENDENT COUNSEL,
Petitioner,

v.

ALLAN J. FAVISH, ET AL.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS SHEILA FOSTER ANTHONY AND LISA FOSTER MOODY

James Hamilton
Counsel of Record
Robert V. Zener
Swidler Berlin Shereff Friedman, LLP
Suite 300
3000 K Street, NW
Washington, DC 20007
(202) 424-7500
Counsel for Respondents Sheila Foster Anthony and Lisa Foster Moody

BRIEF FOR RESPONDENTS SHEILA FOSTER ANTHONY AND LISA FOSTER MOODY

In his petition for certiorari on behalf of the Office of Independent Counsel, the Solicitor General rightly contends that the Ninth Circuit Court of Appeals decisions in this case conflict with decisions of this Court and other Circuits as to important issues regarding Exemption 7(C) of the Freedom of Information Act (5 U.S.C. § 552) ("FOIA"). The Solicitor General also contends that two of the three questions presented by the Foster family's petition for certiorari from the same Ninth Circuit decisions warrant certiorari (No. 02-599). While we agree with most of what the Solicitor General says, we disagree with him in two respects.

1. The Solicitor General asks that the petitions for certiorari be held pending this Court's decision in *United States Dep't of the Treasury, Bureau of Alcohol, Tobacco & Firearms v. City of Chicago*, No. 02-322 ("*ATF*"), on the ground that this case and *ATF* both involve "an analysis of the public interest under [FOIA] Exemption 7(C) and how it should be weighed against the privacy interest in material withheld under that Exemption." Petition at 7.

However, this case and *ATF* present very different aspects of the public interest analysis under Exemption 7(C). In *ATF*, the City of Chicago is seeking government information in order to further its suit in state court against gun manufacturers, in which the City alleges that the manufacturers' marketing practices have facilitated violations of the City's firearms ordinances. The Solicitor General does not challenge the City's assertion that the records would assist its state court suit; instead, he argues that the only relevant public interest under Exemption 7(C) is the public's interest "in evaluating the conduct of the federal government," and that this interest is not furthered by the

City's lawsuit against the gun manufacturers. Petition (No. 02-322) at 17-18.

In the present case, conspiracy theorist Alan Favish is seeking government information to support his contention that the several investigations of Vince Foster's death, all of which concluded that he committed suicide, came to the wrong conclusion, and that the last investigation conducted by Judge Starr was "grossly incomplete and untrustworthy." Petition App. (No. 02-954) at 38. If his allegations were at all plausible (and they are not), they would indicate a public interest in evaluating the conduct of the federal government.

Thus a central issue presented in this case (but not in *ATF*) is whether a federal court reviewing a FOIA request has an obligation to weigh allegations of government misfeasance before concluding that they warrant overriding a privacy interest in government law enforcement records. As the Solicitor General correctly points out, by holding that "bald allegations of governmental misconduct" are sufficient to override a privacy interest, the Ninth Circuit is in conflict with the D.C. and Fourth Circuits and with this Court's decision in *United States Dep't of State v. Ray*, 502 U.S. 164 (1991). Petition at 9-11. This is an important issue, and there is no reason to believe that it will be resolved by *ATF*, which does not involve a claim of governmental misconduct.[1]

To summarize the above, while the City of Chicago's allegations of public interest are plausible and do not require further substantiation, they are not relevant to the public

[1] In his brief in *Oguaju v. United States Marshals Service*, No. 02-5651, the Solicitor General admits that "the public interests asserted in *ATF v. City of Chicago* . . . do not involve an allegation of governmental misconduct." (p. 4).

interest in evaluating the federal government's conduct. By contrast, while Favish's allegations would (if substantial) implicate the public interest in evaluating the federal government's conduct, they are implausible, lack any substantiation, and thus raise the issue as to the degree of evidence required to demonstrate that there is a public interest that outweighs privacy interests. The cases are different, and a decision in *ATF* is not likely to control here.

Moreover, as the Solicitor General points out, the court of appeals in this case erred in holding that the multiple, lengthy investigations that already had taken place and the enormous volume of materials (including photographs) concerning Foster's death already in the public domain are irrelevant to determining what public interest there is in disclosure of the photographs at issue. Petition at 15. As the Solicitor General observes, the Ninth Circuit's opinion in this regard is in conflict with the Fifth, Seventh and D.C. Circuits and with this Court's opinion in *United States Dep't of State v. Ray*, 502 U.S. 164 (1991). Petition at 15-17. Nothing in *ATF* touches this issue, which is important and needs to be resolved.

There is only one issue common to this case and *ATF* -- whether a nexus must be shown between the claimed public interest and the records sought. In the *ATF* petition, the Solicitor General, in answering the Seventh Circuit's statement that the request for records served the public interest in the ATF's performance of its duties, noted that the court had not explained how the records sought would achieve that purpose. *ATF* Petition (No. 02-322) at 18. In the present case, both our petition and the Solicitor General's pointed out that no nexus has been shown between Favish's assertion of governmental misconduct and the photographs the court of appeals ordered to be released. Petition (No. 02-954) at 11-14; Petition (No. 02-599) at 12-14.

However, even if *ATF* resolves the nexus issue there presented, that will not resolve this case. If the Ninth Circuit adheres to the position that the photographs it ordered released do not implicate a privacy interest, then Favish will not have to demonstrate that they have a nexus to the public interest; a balancing of the public interest against the privacy interest is required only if a privacy interest is implicated[2] and, if it is not, release is required unless some other FOIA exemption applies. *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136 (1989); *United States Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988). Thus a remand of this case in light of a decision in *ATF* on the nexus issue promises to be a meaningless exercise, which likely will impose yet another year or more of burdensome litigation costs on the Foster family with no tangible result, and which will bring this case back to this Court with both the public interest and privacy issues still unresolved.

2. The petition for certiorari filed by Mr. Foster's sister and widow (No. 02-599) raises the issue of whether the court of appeals correctly held that public release of law enforcement records that are not "graphic, explicit, and extremely upsetting" does not invade the survivors' privacy. That issue is not presented by *ATF*, which does not concern in any way the survivors' privacy interest. The Solicitor General argues that the court of appeals' decision contains no explicit holding on this issue. Brief for the Federal Respondent (No. 02-599) at 5. In our reply brief in No. 02-599, we observed that the record shows that the court of appeals must have agreed with the district court's clear (and erroneous) holding that only items that are "graphic, explicit, and extremely upsetting" give rise to a survivor privacy

---

[2] The Solicitor General recognizes that, if the case is remanded, the Ninth Circuit will have to consider the privacy issue. Brief for the Federal Respondent (No. 02-599) at 7.

interest. Moreover, as noted above, if the court of appeals' decision rejecting a privacy interest in these photographs is undisturbed, then the public interest issues on which the Foster family and the Solicitor General seek certiorari will not be reached. That is because, if no privacy interest is implicated, the FOIA requires release unless some other exemption applies, without any examination of public interest concerns. *United States Dep't of Justice v. Tax Analysts, supra*; *United States Dep't of Justice v. Julian, supra*. We thus strongly disagree with the Solicitor General's conclusion that *ATF*, which does not present the survivor privacy issue, should govern this case.

CONCLUSION

The petition for a writ of certiorari should be granted rather than held.

Respectfully submitted,

James Hamilton
Counsel of Record
Robert V. Zener
Swidler Berlin Shereff Friedman, LLP
Suite 300
3000 K Street, NW
Washington, DC 20007
(202) 424-7500

Counsel for Respondents Sheila Foster Anthony and Lisa Foster Moody

January, 2003